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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 690

JOHN W. PORTER, JR. and JNO. W. PORTER also known as JOHN W. PORTER, both individually and as sole partners doing business as the law firm of Porter & Porter,

Petitioners,

VERSUS

OKLAHOMA BACONE COLLEGE TRUST, JOHN BROWN UNIVERSITY, TEXAS CHRISTIAN UNIVERSITY, TEXAS WESLEYAN COLLEGE, UNIVERSITY OF TEXAS, TEXAS A. & M. COLLEGE, SOUTHERN METHODIST UNIVERSITY, BAYLOR UNIVERSITY, OKLAHOMA A. & M. COLLEGE now OKLAHOMA STATE UNIVERSITY, UNIVERSITY OF OKLAHOMA, THE GENERAL BOARD OF EDUCATION OF THE METHODIST CHURCH OF NASHVILLE, TENNESSEE, FIRST NATIONAL BANK IN DALLAS as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased, THE FIRST NATIONAL BANK AND TRUST COMPANY OF MUSKOGEE as Administrator with Will and Codicil annexed of the Estate (in Oklahoma) of Murray Case Sells, deceased, BRUCE BENNETT as Attorney General of the State of Arkansas, MAC Q. WILLIAMSON as Attorney General of The State of Oklahoma, and WILL WILSON as Attorney General of the State of Texas,

Respondents.

PETITION FOR REHEARING

JOHN W. PORTER, JR. of
PORTER & PORTER,
630 Equity Building,
Muskogee, Oklahoma,
Counsel for Petitioners.

April, 1960.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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Respondents.

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Come now the above named petitioners in their personal capacities as well as their trust capacities herein, and show that the Supreme Court of the United States

did on March 28, 1960, deny their Petition for Writ of Certiorari herein (declined to accept jurisdiction herein), and said petitioners therefore petition and pray said Court herein under its Rule 58 to reconsider the matter and accept jurisdiction of their said Petition for Writ of Certiorari, and for additional reason allege and state:

If it was the duty of petitioner Jno. W. Porter in his "watchdog" trust capacity to defend and uphold the Codicil trust involved when it was cancelled in the second Texas contest; and if it be contended that he had the opportunity to so defend the Codicil trust, and that he failed to do so, and that he was accordingly bound thereby in the later Oklahoma proceedings herein, as was so held by the Oklahoma Supreme Court; then in opposition thereto, we urge the new point that the law provides for the opportunity and remedy said "watchdog" trustee sought herein in the Oklahoma courts to recover the trust assets and have the Codicil trust reinstated (*Locus Poenitentiae*):

> "Not only can the beneficiary maintain a suit against a transferee of trust property who is not a bona fide purchaser, but the trustee himself can maintain a suit against the transferee. Although the trustee if he held the property free of the trust would have no cause of action against the transferee, he is permitted to maintain a suit for the benefit of the trust estate. Although the trustee bases his cause of action upon his own voluntary act and even though the act was knowingly done in breach of his duty to the beneficiary, he is permitted to maintain the action since the purpose of the action is to recover money or other property for the trust estate—" Restatement of the Law (American Law Inst.) "Trusts" Sec. 294, page 899.

"Where the sale was in breach of trust, the trustee may according to the majority view repent of his wrongdoing and sue to avoid the transfer." Bogert on Trusts, Sec. 746, page 628.

"The wrongdoing trustee has a duty to secure the return of the property from the wrongful purchaser." Bogert on Trusts, Sec. 747, page 635.

"If a trustee exceeds his powers, his acts are a nullity, and, in the absence of other considerations, are ordinarily without force and effect, and acts done in contravention of the trust and not authorized by statute are void. A trustee who has been guilty even of an intentional fault is entitled to his *locus poenitentiae* and an opportunity to repair the wrong committed." 90 C.J.S. "Trusts", Sec. 246, page 220.

"Whoever receives property knowing that it is transferred to him in violation of a trust, takes it subject to the right not only of the *cestui*, but also of the trustee, to reclaim possession." 2 Perry on Trusts (4th Ed.), Sec. 815.

—*Wetmore* v. *Porter*, 92 N.Y. 76, 19 N.Y. Court of Appeals 225;

Townsend v. *Winburn*, 177 N.Y.S. 757, 107 Misc. 443.

We did not present this new point in our Petition for Writ of Certiorari, because we there took the view that Jno. W. Porter was present in the Texas cancellation only in the capacity as attorney for the Texas Executor, and in no other capacity, all as therein fully explained. We there took the view that the law would not compel Jno. W. Porter to simultaneously represent two conflicting interests—the Executor that he had represented from the start,

and the "watchdog" trustee who had never had occasion to act. That since he appeared in the Texas cancellation only as attorney for the Texas Executor to carry out its wish to help the schools purportedly destroy the Codicil to save its own skin, contrary to his legal advice to it; he would not be compelled to simultaneously appear there and act and be bound also as the "watchdog" trustee of the Codicil when it would have been his trust duty to defend the Codicil containing the trust. However, since this Supreme Court of the United States denied certiorari herein, it might have rejected this view and taken a different view, and so all we can do now is urge this new point of *Locus Poenitentiae* and the point urged in the next paragraph. A trustee should be afforded as many opportunities as necessary to the end of saving and recouping the trust he is assigned to guard and carry out, particularly when there is no just reason to deny such or when he has previously been unable to freely act. Courts should do all possible to help recoup and protect educational trusts such as the Codicil involved. Also:

This Court in repeated criminal cases year after year gets quite exercised about prolonging the physical existence of a few persons convicted of crimes—saving them from the electric chair or gas chamber, because of some constitutional protection. This may be a worthy cause as far as it goes, but the end result is very problematical as to any general betterment of the public. This may save a few lives, and give a limited education on constitutional law. But would it not be wiser for the Court to get exercised about the constitutional protection and preservation of educational trusts such as this Codicil, to better educate

future citizens, parents, religious leaders, teachers, doctors, statesmen, psychiatrists and scientists, so there would be less crime—and to better educate future judges and lawyers, so there would be less violation of the Constitution? In other words, would it not be wiser to follow the rule that an ounce of prevention is worth a pound of cure? It may be important to be concerned about the judicial proceedings against a few purported criminals; but is it not more important to be concerned about educational trusts for the benefit of the deserving young men and women of our Nation, to the end of saving lives and souls and constitutional rights and privileges on a much larger scale? These deserving young men and women may well save our Nation by reason of such better education. Is it not important to get exercised about their constitutional rights and protection? They are the beneficiaries of the Codicil trust that the "watchdog" trustee is now asking this Court to reinstate and recoup for them. Is this asking too much? Isn't this a worthy case?

Respectfully submitted,

JOHN W. PORTER, JR. of
PORTER & PORTER,
630 Equity Building,
Muskogee, Oklahoma,
Counsel for Petitioners.

April, 1960.

CERTIFICATE OF COUNSEL

This is to certify that this petition for rehearing is presented in good faith and not for delay, and that the foregoing points of *Locus Poenitentiae* and an ounce of

prevention is worth a pound of cure are the only points urged herein and they were not presented in the Petition for Writ of Certiorari heretofore filed in this case, and copies of this petition for rehearing were delivered to and served on opposing counsel Julian B. Fite and A. Carl Robinson and mailed to the three Attorneys General respondents herein this April , 1960.

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Muskogee, Oklahoma,
Counsel for Petitioners.